U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-J-H-

DATE: APR. 15, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an entrepreneur restaurant owner, seeks second preference immigrant classification as an alien of exceptional ability or, alternatively, member of the professions holding an advanced degree, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). After the petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner qualifies for EB-2 classification as an alien of exceptional ability. In addition, she found that a waiver of the required job offer, and thus of a labor certification, would not be in the national interest.

On appeal, the Petitioner asserts that she qualifies as an alien of exceptional ability, and should be granted a national interest waiver.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

In addition, the regulation at 8 C.F.R. § 204.5(k)(2) includes the following definitions:

> (2) *Definitions.* As used in this section: *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[1] *Dhanasar* states that after EB-2 eligibility has been established, USCIS may, as a matter of discretion, grant a national interest waiver when the below prongs are met.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or

[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[2]

II. ANALYSIS

The Petitioner seeks second preference immigrant classification, but did not clearly indicate whether she was eligible as an alien of exceptional ability or as a member of the professions holding an advanced degree. In his notice of intent to deny (NOID), the Director therefore sought evidence under both provisions, but noted that the Petitioner had indicated on Form ETA 750 that she possessed a baccalaureate degree in journalism, and that this "does not appear to be field of employment in which the beneficiary is seeking employment." However, the definition of "advanced degree" listed above does not require that a foreign national must hold a degree in a particular field in order to qualify as a member of the professions holding an advanced degree. It does require that the required five years of progressive experience be "in the specialty." We will therefore first consider whether the evidence establishes the Petitioner's eligibility for the second preference immigrant classification as a member of the professions holding an advance degree.

A. Member of the Professions Holding an Advanced Degree

In response to the Director's NOID, the Petitioner submitted official transcripts from [redacted] in Korea which show that she completed a four-year Bachelor of Arts program with a major in communication in 1990. Also included was a "Certificate of Degree" from the same institution which verifies this information. This evidence establishes that she holds a foreign degree that is equivalent to a United States baccalaureate.

Regarding the required five years of progressive experience in the field, the Petitioner submitted letters from her CPA, the [redacted] AK, and other local government and businesspeople which verify that she has owned and operated [redacted] restaurant since 2011.

As the Petitioner has submitted evidence which demonstrates that she holds the equivalent of a United States baccalaureate degree, and has more than five years of experience as the owner and CEO of her restaurant, she has established her eligibility as a member of the professions holding an advanced

[2] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

degree. As she therefore qualifies for the second preference immigrant classification, we need not determine whether she also qualifies as an alien of exceptional ability.

B. National Interest Waiver

As noted above, the Petitioner intends to come to the United States to continue to own and operate a restaurant in Alaska. Although she also mentioned a second restaurant in the record does not include further information about this restaurant or the Petitioner's ownership, management or future plans for it. For the reasons discussed below, we find that the Petitioner has not established her eligibility for a national interest waiver under the analytical framework set forth in *Dhanasar*.

1. Substantial Merit and National Importance of the Proposed Endeavor

The Petitioner submitted information about the small size and remoteness of the area, as well as letters from local officials and business owners testifying to the restaurant's positive reception in the community. In his decision, the Director found that the Petitioner's proposed endeavor as a business owner has substantial merit. We agree that the venture's positive economic impact on the community meets the requirements of this initial half of the first prong.

However, the Petitioner has not submitted sufficient evidence demonstrating that her proposed endeavor is of national importance. The Director noted that the restaurant's economic impact would affect only the local community. On appeal, the Petitioner refers to the *Dhanasar* decision's statement that even local businesses may be considered to have national importance, "particularly in an economically depressed area," and to evidence regarding the relatively high unemployment in Alaska. However, that portion of the *Dhanasar* decision stresses that such an endeavor would need to show "significant potential to employ U.S. workers" or have other "substantial positive economic effects."

Here, the evidence indicates that the restaurant employed 20 workers in the fourth quarter of 2018, paying out total wages just above $68,000, or an average of $3,400 per worker. In addition, the Petitioner submitted a brief business plan which indicates that she intends to hire five to ten additional full-time employees, although she did not explain or support the business need for additional employees. This evidence does not sufficiently establish that the employment of 20 workers, or even potentially 30 workers, at the demonstrated rate of pay would have substantial positive effects in a community of approximately 14,000. In addition, it does not demonstrate that the proposed endeavor offers benefits which extend beyond the community to impact the restaurant industry more broadly. Accordingly, we agree with the Director and find that the Petitioner has not met the first prong of the *Dhanasar* framework.

2. Well Positioned to Advance the Proposed Endeavor

As noted above, there are several factors which we consider in determining whether the Petitioner is well positioned to advance the proposed endeavor. On appeal, the Petitioner asserts that the Director misapplied this prong when he considered only her brief business plan in determining that she was not

well positioned. As the Petitioner notes, Schedule C of the Petitioner's tax returns for the years 2012 through 2016 show sales almost doubling to $820,000 and net income increasing from $19,000 to nearly $68,000. However, those schedules are the only portion of the tax returns which were submitted, and do not include the Petitioner's signature or any indication that they were filed with the Internal Revenue Service. Without the complete tax returns, along with evidence that they have been filed, this evidence is not verifiable and thus does not sufficiently support the Petitioner's assertions regarding the success of her restaurant.

In addition, the Petitioner's degree in communication has not been shown to be directly related to her proposed endeavor, and the record includes conflicting and incomplete information regarding her previous experience as a restaurant owner and operator. Specifically, the Petitioner submitted a resume which indicates that she served as the owner and president of a restaurant and bar in South Korea, from 2002 to 2007. However, the record also includes a "Certificate of Job Career" in Korean with an English translation, which states that she held the position of manager at another restaurant in from March 1, 2003 to April 20, 2007, working six days per week. The Petitioner has not explained how she apparently worked two full-time jobs during this period, and has not submitted evidence in support of her employment at Also, neither position is listed in Item 15 of the Form ETA-750B which the Petitioner completed and signed, despite instructions on the form which state that "any other jobs related to the occupation for which the alien is seeking certification" should be listed. Therefore, we find that the record does not adequately demonstrate that the Petitioner has the requisite education, skills and experience to establish that she is well positioned to advance her proposed endeavor.

3. Balancing Factors to Determine Waiver's Benefit to the United States

As explained above, the third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. Here, the Petitioner claims that she is eligible for a waiver due to her successful operation of a restaurant and the positive economic impact that has on the Alaska community. However, as the Petitioner has not established that her endeavor is of national importance as required by the first prong of the *Dhanasar* framework, or that she is well positioned to advance her proposed endeavor, she is not eligible for a national interest waiver, and further discussion of the balancing factors under the third prong would serve no meaningful purpose.

III. CONCLUSION

The evidence establishes that the Petitioner is eligible for classification as a member of the professions holding an advanced degree. However, as she has not met the three prongs of the analytical framework set forth in the *Dhanasar* decision, we find that she is not eligible for or otherwise merit a national waiver as a matter of discretion.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; Matter of Skirball Cultural Ctr., 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of S-J-H-*, ID# 2796031 (AAO Apr. 15, 2019)